IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION NO. 9 OF 2005

Mrs. Cecilia Fernandes,
W/o Paul Fernandes,
R/o Oval Park,
H.No. 993, Alto Betim,
Porvorim, Bardez, Goa. ... Applicant

versus

1. State
as represented by the
Director General of Police,
Police Headquarters,
Panaji, Goa.

2. Mr. Mahesh Gaonkar,
Police Inspector,
Vasco Police Station,
Vasco, Goa. ... Respondents

Mr. J. P. D'Souza, Advocate for the applicant.

Mr. S. N. Sardessai, Public Prosecutor for the respondents.

CORAM : N. A. BRITTO, J.

DATE : 6TH APRIL, 2005.

ORAL ORDER

Article 22(1) of our Constitution boldly and

beautifully declares that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest and will have a right to consult and to be defended by a legal practitioner of his choice.

2. The right of the accused to consult his Advocate in confidence became a myth, thanks to the ignorance, real or feigned, shown by respondent no.2, and slow action on the part of the learned J.M.F.C., Vasco-da-Gama, in giving effect to the exercise of that right by the accused.

3. The applicant is the mother of the principal accused involved in Vasco Police Station Crime No. 9/05 under Sections 302, 120 B and 201 I.P.C. Her son was arrested on 19-1-2005 and she was informed of his arrest on the next day and she instructed one Advocate Shri Saudagar to meet her son in custody to seek legal instructions. On 25-1-2005 Advocates Shri Saudagar and Ms. C. Colasso went to meet the said accused and another accused by name Francis D'Sa involved in the same case, and at the time of meeting, respondent no.2 - the Police Inspector investigating the case, insisted standing right near the said Advocate/s while interviewing the said accused and when

Advocate Shri Saudagar informed respondent no.2 that he wanted to interview his client without being overheard by any Police Officer, though within his sight, respondent no.2 simply refused to allow the said privilege to be given to the said accused. Respondent No.2 informed the said Advocate Shri Saudagar that he would ask his superior Officers if such permission could be given and though Shri Saudagar waited there for 45 minutes no permision came about.

4. The applicant, therefore, filed an application before this Court on 27-1-2005 under Section 482 of the Code of Criminal Procedure, 1973 praying for directions to be issued to the respondents to permit the said Advocate to interview the said accused without any Police Officer being present within earshot. Notice of the application was ordered to be given to the respondents to file their reply, and by interim Order, on the same day, the applicant was directed to approach the learned J.M.F.C., as the applicant's son was remanded to Police custody at the orders of the learned J.M.F.C. who was also directed to dispose of the application in accordance with law.

5. The applicant through her Advocate filed an application on the same day to the learned J.M.F.C., Vasco-da-Gama to direct the Vasco Police to allow him to have an interview/confer with the said accused out of the earshot of the Police which application was registered as Criminal Miscellaneous Application No. 6/05/D and the same was allowed by the learned J.M.F.C., Vasco-da-Gama by Order dated 31-1-2005. In other words, the learned J.M.F.C. allowed the accused to talk to his Advocate, with the police standing at a reasonable distance as not to hear the conversation. The said Order is stated to have been pronounced in the open Court in the presence of the Assistant Public Prosecutor who was appearing in the case. However, the learned J.M.F.C. did not provide any copy of the Order to the Advocate of the accused so as to enable him to act thereon or give any instructions to the learned Assistant Public Prosecutor to convey the same to the Investigating Officer.

6. The said Advocate applied for a certified copy on the same day and paid necessary charges but was informed that the certified copy would be ready on 2-2-2005 and then he proceeded to the Vasco Police Station where he met two Police

Officers by names B. D. Painalkar and R.A. Pagi and when the said Painalkar was requested to allow the Advocate to confer with the said accused, he only promised him that he would convey his request to his superior Officer. P.S.I. Shri Nilesh Rane was then called for and when permission was sought from him. P.S.I Shri Rane declined to accede to the request of the said Advocate in the absence of a copy of the Order.

7. Another application was filed before the learned J.M.F.C. on 1-2-2005 i.e. to say on the next day, for issuance of appropriate directions in terms of the Order dated 31-1-2005 and also for appropriate action against the Vasco Police for committing contempt of court. A reply to the said application was called for and the application was posted on 2-2-2005. On the same day i.e. 2-2-2005 the said accused was remanded to 14 days judicial custody and the learned J.M.F.C. by her Order dated 2-2-2005 observed that the said Advocate for the said accused had failed to produce a copy of the Order passed by her on 31-1-2005 and on that count the said Advocate could not converse with the said lawyer. The learned J.M.F.C. also observed that she did not find any fault on the part of the Police

Officer/Vasco Police Station and proceeded to dismiss the said application.

8. When the application was made to the learned J.M.F.C. on 27-1-2005, the learned J.M.F.C. ought to have disposed of the application after hearing the opposite party on the next day or at least a day thereafter and issued necessary instructions through the learned Assistant Public Prosecutor to give effect to her Order or at least provide a xerox copy of the Order passed by her free of cost so that the Advocate of the accused could act thereon. The entire exercise done by the learned J.M.F.C., though correctly done, on account of delay, got frustrated and as a result, the said accused did not get an opportunity to consult his Advocate in confidence while in Police custody.

9. Although, the applicant's application now before this Court has become infructuous, and Shri S. N. Sardessai, the learned Public Prosecutor appearing on behalf of the respondents, submits that it be dismissed as infructuous. Mr. D'Souza, the learned Advocate of the applicant submits that this is a difficulty experienced by Advocates very often. I do not

think it would be proper on my part to dismiss the same, in the background of the stand taken by the respondents and the facts of this case without expressing any views on the said application.

10. In addition to Article 22 of the Constitution of India referred to herein above, reference is required to be made to Article 21 of the Constitution which provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. A right to health, a right to privacy, a right to a fair trial, a right to speedy trial, a right to Free Legal Aid, etc. are some of the rights which have now been recognized within the right under Article 21 of the Constitution.

11. Section 126 of the Evidence Act, 1872 makes all communications between professional advisers like a barrister, pleader, etc. and their clients confidential, and it is only when the clients express consent, that such a person may disclose any communication made to him in the course and for the purpose of his employment and the obligation laid down in the Section continues even after the employment has ceased.

12. Section 303 of the Code of Criminal Procedure, 1973 provides that any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice.

13. This Court way back in twenties, even before the Constitution was enacted, in **Llewelyn Evans' case**(AIR 1926 Bom 551) observed as follows:

> "The provisions of Section 340 (now Section 303) extend to the cases not only of a person accused of an offence in a criminal court, but to the case of any person against whom proceedings are instituted under the Code in any Court. That section certainly contemplates that the accused should not only be at liberty to be defended by a pleader at the time the proceedings are actually going on, but also implies that he should have a reasonable opportunity, if in custody, of getting into communication with his legal adviser for the purpose of preparing his defence, unless there are exceptional circumstances."

14. Justice Madgavkar further observed in the said case that "if the end of justice is justice and the spirit of justice is fairness, then each side

should have equal opportunity to prepare its own case, and to lay its evidence fully, freely and fairly before the Court. This necessarily involves preparation. Such preparation is far more effective from the point of view of justice, if it is made with the aid of skilled legal advice - advice so valuable that in the gravest of criminal trials, when life or death hangs in the balance, the very State which undertakes the prosecution of the prisoner, also provides him, if poor, with such legal assistance."

15. In the thirties, the Calcutta High Court in the case of **Sudha Sindhu** v. **Emperor** (AIR 1935 Cal. 101) had stated that all communications between an accused person or indeed any litigant and his legal advisers are privileged and confidential. It is impossible for the accused to have anything confidential about communication with his lawyer if he and his lawyer are surrounded by police officers. But the professional privilege of Advocates can only be upheld if they honourably bear in mind that they are officers of the Court and do not lend themselves in any way to act as intermediaries to facilitate improper communications with other undetected criminal associates of the accused.

16. In the fifties, in the case of **A. K. Gopalan** (AIR (37) 1950 Madras 259) the Court observed that "no Court shall fail in its duty of allowing a party to give instructions to his vakil freely and frankly without

police officers (who naturally represent the other side) being present and taking down shorthand notes of the instructions and broadcasting them thereafter to their superior officers, etc. There is also no rule under which an appellant before the High Court or before the Sessions Judge can be made, under mere executive orders of Government, to submit to the presence of a police officer at the interview between him and his counsel or to such police officers taking down shorthand notes of the instructions between the party and the vakil, obviously for intimating the instructions to the superior officers". The Court also observed that the High Court has power to safeguard the rights of parties before it in civil and criminal cases as laid down by law, ever since its inception, and those rights have been safeguarded and continued under Section 561 A (now Section 482) of the Code of Criminal Procedure and the High Court ought to see that those rights are not infringed. The Court also observed that there could be no objection to the presence of a jail officer at such interview as required under the Madras Jail Manual.

17. In the case of **Moti Bai** v. **The State** (AIR 1954 Rajasthan 241) referring to Article 22(1) of the Constitution of India the learned Judge observed that "in order that this right "to consult a legal practitioner of one's choice" can properly and reasonably be given effect to, it must follow that such legal practitioner must be allowed the facility to consult

the accused whom he seeks to defend, and I may further point out that if such consultation is to be useful, it must be allowed without the hearing of the police though in their presence". The Court further observed the presence of the police is obviously needed so that the accused may not abscond from custody or do anything which may be objectionable and that the right of the accused enshrined in the said Article begins right from the day of his arrest. The Court further observed that the police were not right in not allowing such consultation as seems to have been their attitude throughout.

18. Lastly, in the case of **Francis Coralie Mullin** v. **Administrator, Union Territory of Delhi and others** (1981 SCC (Cri) 212) the Supreme Court stated that the provisions of fundamental rights must be liberally and widely construed and not in a narrow and constricted sense. The Supreme Court observed that the fundamental right to life which is the most precious right and which forms the ark of all other rights must, therefore, be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. The Hon'ble Supreme Court was dealing with the right of a detenu under the Conservation of Foreign Exchange and Prevention of Smuggling

Activities Act, 1974 to have interview with a lawyer and the members of his family and particularly with conditions of Clause 3(b)(i) and (ii) of Delhi Administration (Conditions of Detention Order) dated 23-8-1975. Clause 3 (b)(i) required that the interview with legal adviser in connection with defence of a detenu in a criminal case or in regard to writ petitions and the like, may be allowed by prior appointment, in the presence of an officer of Customs/Central Excise/Enforcement to be nominated by the local Collector of Customs/Central Excise or Deputy Director of Enforcement, who sponsors the case for detention. The Hon'ble Supreme Court held that the said procedure prescribed would cause great hardship and inconvenience and from a practical point of view the right to consult a legal adviser would be rendered illusory. The Supreme Court further held that the presence of an officer at the time of the interview also would seem to be an unreasonable procedural requirement and further held that the said sub-clause 3(b)(i) of the said Order was arbitrary and unreasonable and violative of Articles 14 and 21 of the Constitution and, therefore, unconstitutional and void. The Supreme Court, therefore, proceeded to observe that it was quite reasonable if a detenu was to be entitled to have interview with his legal adviser at any reasonable hour during the day after taking appointment from the Superintendent of the Jail and further stated that the Superintendent of the Jail or some other officer watch the

interview but not so as to be within the hearing distance of the detenu and the legal adviser.

19. What follows from the above discussion and the decided cases is that the right to consult a legal practitioner given by Article 22(1) of the Constitution when considered in the light of the right of personal liberty given under Article 21 of the Constitution in order to be meaningful can be exercised only in confidence and, therefore, out of hearing of the I.O./Police Officer. In other words, the I.O./Police Officer cannot insist to know the instructions given to the Advocate in confidence by an accused. The I.O./Police Officer is certainly entitled to stay at a distance, but not at a hearing distance, and ensure that the said right is not misused or for wider security, if required.

20. In my view, the accused was deprived of this right by the Investigating Officer i.e. the right to consult his Advocate in confidence, while in Police custody.

21. As far as prayer (a) of the petition, the same has now become infructuous. As far as prayer (b) no general directions can be given because the applicant has chosen to invoke a jurisdiction of this Court which, in my opinion, does not permit giving of general directions.

22. With the above observations, I proceed to dismiss the petition leaving the parties to bear their own costs.

A copy of this Order be sent to the Sessions Judges, in both the Divisions, to be circulated to the Judges/Judicial Magistrates, F.C., so that in future if such violations are brought to their notice immediate orders can be issued to ensure that the right of the accused given under the Constitution is not defeated by Police Officers.

N. A. BRITTO, J.

RD.